

IN THE SUPREME COURT OF FLORIDA

**GARY LAWRENCE,
PETITIONER**

**CASE NO.: SC01-674
LOWER TRIBUNAL NO.: 94-397CF**

VS.

**MICHAEL W. MOORE, SECRETARY,
DEPARTMENT OF CORRECTIONS OF
THE STATE OF FLORIDA,
RESPONDENTS**

_____ /

**AMENDED PETITION FOR WRIT OF HABEAS CORPUS –
INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL**

JURISDICTION

1. The basis for invoking the jurisdiction of this Florida Supreme Court is ineffective assistance of Appellate counsel based on fundamental due process errors. Article 1, Section 13, and Article 5, Section 3(b)(9), Constitution of the State of Florida. See Rose v. Dugger, 508 So.2d 321 (Fla. 1987). The following symbols will be used:

1. T - Transcript of Original Trial (Vol. IV – VIII)
2. TS – Transcript of Penalty Phase

3. R – Record of Appeal (Vol. I – IV)

4. Appendix

THE PETITIONER, GARY LAWRENCE, Respectfully shows:

That he was convicted and sentenced to Death for Murder in the First Degree, Conspiracy to Commit Murder in the First Degree, and Grand Theft Auto in Santa Rosa County on May 5, 1995. (R 252) He filed Notice of Appeal May 11, 1995. (R 256) The Florida Supreme Court affirmed his convictions August 28, 1997 in Lawrence v. State, 698 So 2^d 1219 (Fla. 1997). Mandate was filed October 6, 1997. Notice of Affirmance of Death Penalty was entered November 3, 1998. A 3.850 Motion for Post-Conviction Relief was filed January 19, 1999, and an Amended 3.850 Motion filed April 22, 1999.

An evidentiary hearing was held on June 7, 2000, and Order Denying the 3.850 Motion entered on October 11, 2000.

Petitioner is currently in custody at Union Correctional Institute at Raiford, Florida.

Petitioner also filed Petition for Certiorari in the United States Supreme Court and that petition was denied January 20, 1998.

Notice of Appeal from the denial of the 3.850 Motion for Post Conviction Relief was timely filed, and Appellant's (Petitioner's) brief was ordered to be filed

March 27, 2001. Pursuant to Florida Rule of Appellate Procedure 9.140 B 6 E, Petition for habeas corpus is also due upon filing of Appellate's brief.

STATEMENT OF THE CASE

The grand jury of Santa Rosa County indicted **GARY LAWRENCE** on August 8, 1994 for the murder of **MICHAEL DEAN FINKEN**. In addition, the indictment charged Lawrence with conspiracy to commit murder (Count 2); robbery with a deadly weapon (Count 3); and grand theft of a motor vehicle (Count 4). (R 1-4) The defendant entered a plea of not guilty to these charges.

The parties stipulated to the identity of the victim – Michael Finken. (R 200) After the trial, the jury found him guilty as charged in the indictment of first-degree murder, conspiracy to commit first-degree murder and theft of a motor vehicle. (R 201-202) On motion of Mr. Lawrence, the trial court granted a judgment of acquittal on Count 3 – robbery. (T - 624) As a consequence of this decision, the trial court also eliminated felony-murder as a predicate for conviction in Count 1. (T - 624) The trial court reduced the charge in Count 3 to petty theft (T - 624-625) The jury found Mr. Lawrence guilty of this as well.

Mr. Lawrence moved for a new trial on March 27, 1995 on a number of different grounds. (R 208-209) The motion was denied. (Vol. IV-612) After a sentencing phase hearing, the jury recommended the penalty of death on the first-

degree murder conviction by a vote of 9 to 3 on March 27, 1995. (R 203) The trial judge entered a written order sentencing Mr. Lawrence to death on May 5, 1995. (R 239) In doing so, the judge found three aggravating factors – (1) the murder was committed while Lawrence was under sentence of imprisonment; (2) the murder was heinous, atrocious or cruel; and (3) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 231-234) While the trial judge found no statutory mitigating factors (R 234-235), he did find some nonstatutory mitigation while rejecting others. (R 236-238) The result was that in the opinion of the trial court, “The three statutory aggravating factors far outweigh the mitigating factor in the instant case, and the death penalty is the appropriate sentence in this case.” (R 238)

On Counts 2 and 4, Mr. Lawrence was sentenced to 5 years to run concurrent with each other. (R 245, 250) On Count 3, petty theft, Mr. Lawrence was sentenced to time served. (Vol. IV-615)

From these convictions and sentences, Mr. Lawrence filed a timely notice of appeal on May 11, 1995. (Vol. II-256)

The Supreme Court of Florida affirmed Defendant’s conviction and death penalty on August 28, 1997. (Appendix 1) The United States Supreme Court denied *certiorari* January 20, 1998.

STATEMENT OF THE CASE –

3.850 PROCEEDING

Mandate from the Florida Supreme Court was filed October 6, 1997. Notice of Affirmance of the Death Penalty was filed November 2, 1998. *Certiorari* to the United States Supreme Court was denied January 20, 1998. Conflict counsel was appointed November 5, 1998 and 3.850 Motion for Post Conviction Relief filed January 19, 1999. Amended Motion for Post Conviction Relief was filed April 22, 1999.

After a Huff hearing, the trial court set an evidentiary hearing for June 7, 2000. The court's order limiting issues on the 3.850 Motion was entered March 8, 2000.

Evidentiary hearing on the 3.850 Motion was held June 7, 2000 and Order Denying the motion entered October 11, 2000. Notice of Appeal was filed October 23, 2000.

STATEMENT OF THE FACTS

A complete factual finding appears in the Florida Supreme Court decision Lawrence vs. State, 698 So. 2d 1219. (Fla. 1997) (A copy of the opinion appears in Appendix 1.) Defendant also submits a summary of facts herein and includes factual matters relating to the 3.850 post-conviction motion determination.

On the morning of July 29, 1994 Charles Haney, a contractor, found a charred body by the road in a new subdivision in Santa Rosa County. (T 191) After investigating this murder, the sheriff's office arrested Gary Lawrence, and the state charged him with first-degree premeditated or felony murder, conspiracy to commit murder, armed robbery of less than \$300, and auto theft. (R 1) According to the evidence produced at trial, Lawrence was released from prison on January 10, 1994. (R 455) He met Brenda Pitts shortly thereafter, and the two married in March. They did not live together long, however, and at the time of the murder Lawrence was not living in Brenda's apartment. (T 630; 633; see also T 260) The victim moved into Brenda's apartment a couple of weeks before the murder. (T 260)

In his confession, Lawrence told Charles Grice of the Santa Rosa County Sheriff's Office that he and the victim drove Brenda to work in the victim's car on the morning of July 28. (T 423) They arrived at a friend's house around 10:30 to 11:00 a.m. (T 219) and left around noon to pick up Brenda. (T 220; 236) Lawrence, Brenda, and the victim came back to the friend's house before 3:30 p.m. (T 244) The victim was drunk and went inside to lay down on the couch. (T 221; 237) Brenda went in to check on the victim several times while the others stayed on the porch drinking. (T 223; 238) Lawrence said that he "was tired of seeing

Brenda going in to Michael and talking to Michael” (T 239) and threatened to beat the victim and “sling him through the window.” (T 240) Lawrence and Brenda argued. (T 240) Lawrence and the victim talked, however, and shook hands. (T 241) When Brenda started in again, the friend told them to leave. (T 227; 241)

The trio arrived at Brenda’s apartment around 5:00 p.m. (T 264) Just after arriving, Lawrence drew out a knife, threw it on the ground, and punched the victim, who did not fight back. (T 266-67) Brenda and her daughter separated them. (T 267; 311) Lawrence and the victim then walked around the yard and talked and “seemed like everything was all right.” (T 267; 312) Lawrence, Brenda, and the victim came into the apartment about two hours later, and the victim lay down on the couch while Lawrence and Brenda sat together whispering. (T 268, 271; 315) Lawrence and Brenda told Brenda’s daughter and her friend to go into the daughter’s bedroom and stay there. (T 272, 276; 317) The adults gathered several weapons, including a metal pipe and a baseball bat. (T 274; 319) After the adults left the bedroom, the girls heard pounding noises and the victim asking Lawrence to stop hitting him. (T 277-278; 322-23) Lawrence told a neighbor that he beat the victim with the pipe until it bent and, when the victim said he could not move, got the baseball bat and beat the victim with it. (T 362-63) Brenda told the

girls to go get Chris Wetherbee (T 281); when they returned, they saw that a mop handle had been stuck down the victim's throat. (T 282)

After the victim was dead, Lawrence and Brenda discussed how to get rid of the body, and Lawrence decided to burn it. (T 285; 333) They went through the victim's pockets and belongings. (T 367-68) Brenda used bleach on the rug and sandpaper on the wood frame of the couch to remove the victim's blood (T 289; 335), and the couch cushions and the weapons were thrown into a pond behind the apartment. (T 289-90; 335)

The trial court granted Lawrence's motion for judgment of acquittal as to felony murder and robbery. (T 617) Thereafter, the jury found Lawrence guilty of first-degree murder, conspiracy to commit murder, theft of less than \$300, and motor vehicle theft. (R 201; T 751-52) At the penalty phase on March 17, 1995 Lawrence presented testimony from his brother, a psychologist, and a psychiatrist. The jury recommended that he be sentenced to death by a vote of nine to three. (R 203; 564) The court heard argument from the parties on April 27, 1995 (R 571) and set sentencing for May 5, 1995. (R 607) On that date, the court sentenced Lawrence to death, finding that the state had established three aggravators (under sentence of imprisonment; heinous, atrocious, or cruel; and cold, calculated, and premeditated) that outweighed the nonstatutory mitigators. (R 613; 227 et seq.)

The 3.850 Motion also raised the issue that the state's argument to the jury was a burden shifting argument on comment as to defendant's failure to testify. The state argued evidence was "uncontroverted" numerous times. (Vol. VII P. T 685) (Appendix 5) The Trial court in its order denying post conviction relief found the arguments to be permissible and that no hearing would be given.

One of the aggravators presented to the trial jury was that defendant was under a sentence of imprisonment and the trial court granted an instruction as to this claim. The state offered testimony of the witness Colleen Poole, a Department of Corrections employee. (R 454-457; TS 29-32) Ms. Poole testified Mr. Lawrence was released on parole at the time of the homicide.

The state argued in the penalty phase as follows:

The State brought forward evidence of Colleen Poole, the probation officer that testified. She indicated and provided you the documentation which indicated that the defendant, Gary Lawrence on July 28 of 1994 was under the supervision of the Department of Corrections. That he had been sentenced to five years in the state penitentiary for offenses. And that he committed this particular act while under a sentence of imprisonment.

An aggravating circumstance, ladies and gentlemen, that is proven beyond any reasonable doubt.

And we can talk about the psychological testimony that went on and on with respect to this case but the

bottom line is regardless of the psychological evidence and that type of stuff Gary Lawrence, beyond any reasonable doubt was committing a crime while under a sentence of imprisonment. Colleen Poole basically said all that needs to be done if he violates or does anything is an administrative parole. He was under a sentence of incarceration in the state penitentiary. (R 524; TS 99)

Defense counsel did not object to this instruction or argument.

During the guilt phase, the prosecutor argued numerous times that evidence was uncontroverted. (T 685-687) (Appendix 5)

2. Grounds for habeas corpus—Ineffective Assistance of Appellate Counsel Contrary to the V, VI and XIV Amendments United States Constitution and Section 9 Constitution of the State of Florida.

Petitioner alleges that his Appellate Counsel failed to brief or argue the following viable points on direct appeal:

A. Petitioners trial counsel was inadequately prepared for a death penalty case as it was his first death trial, and he was not assisted by co-counsel. Failure of his counsel to secure co-counsel violated the V, VI and XIV Amendments (Due Process and Right to Counsel) of the U.S. Constitution and Section 9 Constitution of the State of Florida. Failure of appellate counsel to raise this issue as fundamental error is ineffective appellate counsel.

B. Petitioner's trial counsel argued in the penalty phase:

We have never at any time in this case disputed Gary Lawrence's guilt, and we have never at any time in this case disputed the fact—or we have never suggested to you that Chris Wetheree should be held to the same degree of accountability as Gary Lawrence. We have never told you that. (Appendix 6)

This argument is a concession of guilt. Failure to raise this issue as fundamental error is ineffective appellate counsel.

C. Petitioner's counsel was inadequate in failing to move for a mistrial as to hearsay evidence offered to support a robbery theory of felony murder. (T - 234-236) argument or evidence of an alleged robbery of the victim necessarily infected the trial jury and failure to request a mistrial or curative instruction rendered Defendant's counsel performance deficient. Likewise, the inclusion of a robbery argument by the State without a subsequent limiting instruction to the jury denied Defendant due process under article I, Section 9, of the Florida Constitution, and the V, VI and XIV Amendments to the United States Constitution.

Failure to raise this issue as fundamental error is ineffective appellate counsel.

D. Petitioner's appellate counsel failed to raise any issues as to the guilt phase on appeal, although trial counsel properly preserved the same or such errors

were fundamental. Thus, the Florida Supreme Court was limited to review of the death penalty issues only.

Defendant's trial attorney filed a Motion for New Trial and Statement of Judicial Acts to be Reviewed. Copies are attached and incorporated by reference as Appendix 2 and 3.

Defendant's appellate counsel failed to raise two pertinent trial errors in the Motion for New Trial. Copy of Appellant's Brief's Table of Contents containing issues argued and briefed are attached and incorporated by reference as Appendix 4.

Failure to raise these trial issues as fundamental error is ineffective appellate counsel.

E. State's counsel argued repeatedly during closing argument in the guilt phase that evidence was "uncontroverted." Defense counsel failed to object or move for mistrial as Defendant did not testify and the argument was a prejudicial comment on his failure to testify (Appendix 5). Furthermore, said comment was a burden shifting argument that inferred defendant was required to controvert an issue or evidence. It also amounted to an expression of the prosecutor's personal opinion as opposed to legal argument. Said argument violated Defendant's due

process rights under Section 9, Florida Constitution and V, VI and XIV Amendments United States Constitution.

Failure to raise this issue as fundamental error is ineffective appellate counsel.

F. The trial court failed to grant a mistrial over reference to the witness testifying that he had contact with Defendant since “he (defendant) got out of prison.” Said reference to defendant’s prior conviction during guilt phase denied him due process. To the extent Defendant’s appellate lawyer failed to raise the issue on appeal his performance was ineffective assistance of counsel on appeal. This error denied Defendant of due process under Article I, Section 9 of the Florida Constitution and the V, VI and XIV Amendments to the United States Constitution.

G. Co-Defendant, Brenda Lawrence, (Defendant’s wife) was sentenced to life without parole on April 27, 1995. The Trial Court nevertheless imposed a death penalty upon Defendant, GARY LAWRENCE, knowing of the disparity of Brenda Lawrence’s life sentence although she actively participated in the homicide. The jury in Brenda Lawrence’s case recommended a life penalty while Defendant’s jury recommended death.

Although the Florida Supreme Court addressed this, failure to raise this issue as fundamental error is ineffective appellate counsel.

H. There was insufficient or improper evidence of a so-called aggravator in the sentencing phase that Defendant was under a sentence of imprisonment. Defendant on conditional release from prison does not constitutionally establish “under sentence of imprisonment” under due process standards of the V, VI and XIV Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution. The jury should have been given limiting instructions regarding this aggravator since Defendant was not in prison.

Failure to raise this issue as fundamental error is ineffective appellate counsel.

I. The Court improperly admitted hearsay evidence regarding a \$200 wire transfer to the victim Finken. Said evidence went to the so-called robbery/felony murder issue which was later subject to Judgment of Acquittal. Argument and admission of said robbery issue tainted Defendant’s trial by raising another crime, thus denying Defendant’s due process under Article I, Section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Trial counsel was deficient in failing to keep this evidence out in limine or by way of a pre-trial Motion to Dismiss. Appellate counsel was deficient in failing to raise this issue as error or fundamental error.

J. The Florida Supreme Court failed to conduct a meaningful harmless error analysis when considering the effect of an erroneous jury instruction regarding

the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstance, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

These instructions were unconstitutionally vague and overbroad. The Florida Supreme Court's harmless error analysis was Fifth, Eighth and Fourteenth Amendment error. In order for constitutional error to be harmless, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the (outcome) obtained." The burden is on the State to show the harmlessness of the error and to overcome a presumption of harm. If there is a reasonable possibility that the constitutional error might have contributed to the jury's recommendation, the error is not harmless beyond a reasonable doubt and Mr. Lawrence is entitled to relief.

Failure to raise this issue as fundamental error is ineffective appellate counsel.

K. Mr. Lawrence's jury was improperly instructed on the under sentence of imprisonment aggravating factor, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. To the extent counsel failed to object or proffer adequate instructions, counsel rendered deficient performance that prejudiced Mr. Lawrence. This claim is evidenced by the following:

1. Mr. Lawrence's jury was instructed that it could consider that "the crime for which Defendant is to be sentenced was committed while he was under sentence of imprisonment." (R 253) The jury was not told that the weight of this aggravator was less if the Defendant had not committed the homicide after escaping from confinement.

2. The jury was not advised that the weight of this aggravator was lessened because Mr. Lawrence obtained his release from prison by legal and non-violent means. In considering this aggravator, the jury needed to be fully instructed.

Failure to raise this issue as fundamental error is ineffective appellate counsel.

L. Mr. Lawrence's sentencing jury was misled by comments and instructions which unconstitutionally and inaccurately diluted its sense of responsibility for sentencing in violation of the Eighth and Fourteenth Amendments to the United States Constitution. This claim is evidenced by the following:

1. Mr. Lawrence's jury was repeatedly and unconstitutionally instructed by the Court that its role was merely "advisory." Here, however, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment to the United States Constitution.

2. A capital sentencing jury must be properly instructed as to its role in the sentencing process. Therefore, even instructional error not accompanied by a contemporaneous objection warrants reversal.

3. The Court failed to instruct the jury that their recommendation would carry great weight and would be overridden in circumstances where no reasonable person could agree with it.

4. To the extent counsel failed to object and litigate this issue, request curative instructions, and move mistrial, counsel rendered deficient performance. Failure to raise this issue as fundamental error is ineffective assistance of appellate counsel.

M. That the ineffective assistance of appellate counsel issues were of such magnitude as to constitute serious or substantial deficiency which fell measurably outside the range of professionally acceptable performance, and the deficiencies compromised the appellate process to such a degree as to undermine the appellate court's confidence in the correctness of result.

ARGUMENT IN SUPPORT OF PETITION
AND CITATION OF AUTHORITIES

Petitioner has been denied effective assistance of appellate counsel. Significant appellate issues were not raised in his initial appeal. Although some

issues were not objected to by trial counsel, their magnitude raises them to fundamental error in a capital case warranting a meaningful appellate process. Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1995) holds that appellate counsel is not ineffective for failing to raise claims that could have or should have been raised on appeal or were not objected to at trial.

However, Clark v. Dugger, 559 So. 2d 192 (Fla. 1990) correctly states the law that appellate counsel is not ineffective for failing to raise claims that were not objected to unless they amount to “fundamental error”. (Emphasis supplied)

It is also established law that habeas corpus, may be a vehicle for the securing of substantial justice as to an appellate issue. McDaniel v. Staten, 219 So. 2d 421 (Fla. 1969). See also Wyatt v. State, 697 So.2d 1289 (Fla. 1997) granting belated appeal due to ineffective appellate counsel.

For a comprehensive view of availability of habeas corpus to view appellate issues see Reddick v. State, 190 So. 2d 340 (Fla. 1966).

“Thus the majority opinion of Mr. Justice Douglas
says (text 67 S.Ct. 1590):

‘* * * (t)he general rule is that the writ of habeas corpus will not be allowed to do service for an appeal. * * * Yet, on the other hand, where the error was flagrant and there was no other remedy available for its correction, relief by habeas corpus

has sometimes been granted (citing cases). * * *
(As where no other opportunity existed, habeas
corpus would be the appropriate remedy.”

Two significant issues were raised by trial counsel in his Motion for New
Trial and Statement of Judicial Acts to wit:

1. Reference to Defendant’s prior imprisonment by the witness,
Robert Roher who stated he knew Defendant “since he got out of prison.” (T-596
– 600) (Appendix 7)
2. Exclusion of testimony of witness Carol Thomas which would
establish Defendant’s alcohol consumption.

These issues were not presented by Petitioner’s appellate counsel as
evidenced by initial brief’s Table of Contents. (Appendix 4)

Reference to defendant’s prior incarceration is prejudicial. See Collier v.
State, 681 So.2d 856 (Fla. 5th DCA 1996)

Petitioner was not afforded a meaningful direct appeal. Issues fundamental
in nature were not raised or issues raised at trial and set forth in the Statement of
Judicial Acts were not addressed by appellate counsel. Such omission is
ineffective assistance of appellate counsel that must be remedied by habeas corpus
granting a meaningful appeal.

NATURE OF RELIEF SOUGHT

Issue Writ of Habeas Corpus to permit belated direct appeal based upon ineffective appellate counsel.

WHEREFORE, Petitioner prays this Supreme Court issue Writ of Habeas Corpus and for such other relief as is appropriate.

DATED this ____ day of _____, 2001.

JOSEPH F. McDERMOTT, ESQUIRE
McDERMOTT LAW FIRM, P.A.
7116-A Gulf Blvd.
St. Pete Beach, FL 33706
Ph: (727) 367-1080, Fx: (727) 367-9940
SPN: 00002251, FBN: 052469
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail to MICHEAL MOORE, SECRETARY, Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida 32399-2500, the Office of the Attorney General, Attention: BARBARA YATES, ASST. ATTORNEY GENERAL, The Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050, and The Office of the State Attorney, JOHN MOLCHAN, ASA, Santa Rosa County, P O Box 645, Milton, Florida 32572 this the _____ day of _____, 2001.

JOSEPH F. McDERMOTT, ESQUIRE
McDERMOTT LAW FIRM, P.A.
7116-A Gulf Blvd.
St. Pete Beach, FL 33706
Ph: (727) 367-1080, Fax: (727) 367-9940
SPN: 00002251, FBN: 052469
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Amended Petition for Writ of Habeas Corpus complies with Rule 9.100(1) and Rule 9.210(a)(2), FLORIDA RULES OF APPELLATE PROCEDURE, and that this Brief has been submitted in Times New Roman 14-point font.

JOSEPH F. McDERMOTT, ESQUIRE
McDERMOTT LAW FIRM, P.A.
7116-A Gulf Blvd.
St. Pete Beach, FL 33706
Ph: (727) 367-1080, Fax: (727) 367-9940
SPN: 00002251, FBN: 052469
ATTORNEY FOR APPELLANT